Bonifac Lobo a/l Robert V Lobo & Anor v Tribunal Pengurusan Strata, Putrajaya & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(A)-943–05 OF 2017
ZAWAWI SALLEH, BADARIAH SAHAMID AND ZALEHA YUSOF JJCA
23 MAY 2019

Civil Procedure — Appeal — Appeal against High Court's decision on judicial review ('JR') application — Whether High Court rightly dismissed JR application against decision of Strata Management Tribunal — Whether tribunal's award did not suffer from any illegality or irrationality — Whether tribunal president had adjudicated the merits of the case properly without mala fide or improper motive eventhough he had displayed undesirable judicial temperament when conducting proceedings — Whether parties before tribunal were given fair hearing — Whether no rules of natural justice were breached

The first appellant ('Lobo') owned a parcel in a stratified building and was the chairman of the joint management committee ('JMC') for the building. When all the other elected members of the JMC resigned, leaving Lobo alone in the JMC, an extraordinary general meeting ('the EGM') was called which elected the third to the ninth respondents into the JMC. Lobo contended that the EGM and the election of the new JMC members was invalid because it was done pursuant to a repealed law, namely, the Building and Common Property (Maintenance and Management) Act 2007 ('the 2007 Act') which had been replaced by the Strata Management Act 2013 ('the 2013 Act'). The newly-elected JMC members applied for and obtained from the High Court a declaration that their election was valid and lawful. Lobo nevertheless filed a claim over the matter with the first respondent ('the tribunal') and also applied, using Form 14 of the 2013 Act, to get the tribunal to cancel notices that had been issued by new JMC for the holding of an annual general meeting ('AGM'). Contending that the second respondent ('the president') had made adverse remarks about him during the tribunal hearing, Lobo applied to have the president recuse himself from future hearings of the tribunal. The president dismissed the recusal application and went on to dismiss the Form 14 application (on the ground the tribunal had no jurisdiction to decide upon it) and also Lobo's claim on the ground the tribunal was bound by the High Court's ruling recognising the validity of the newly elected JMC. The appellants filed a judicial review application in the High Court to, inter alia, quash the tribunal's award and declare the AGM of the second appellant held on 23 January 2016 null and void. Lobo contended that the tribunal breached the rules of natural justice and the rules of procedural propriety when, inter alia, the president failed to inform him of the law under which he dismissed the

recusal application. The High Court dismissed the judicial review application and held that: (a) the tribunal correctly found that it was bound by the High Court's decision on the lawfulness and validity of the EGM and the newly-elected JMC; (b) the notes of proceedings and evidence showed that Lobo was given full latitude to argue his case and make his submissions before the award was made; (c) the tribunal correctly ruled that it had no power under the 2013 Act to nullify a notice of an AGM; (d) there was nothing wrong with the president conferring with third parties before he made a decision on the recusal application; in any event, the challenge on this ground was not properly taken before the court as it was not set it out in the appellants' statement in support of their judicial review application; and (e) there was no evidence to show the president had acted mala fide or with improper motive in the tribunal proceedings. The instant appeal was against the High Court's decision.

Held, dismissing the appeal and affirming the High Court's decision:

(1) The award of the tribunal did not suffer from any illegality or irrationality warranting interference by the High Court (see para 46).

(2) The notes of proceedings, the first appellant's statutory declaration and the tribunal's award showed that the comments made by the president should be regarded in the proper context — to keep a tight rein on the proceedings of the tribunal. There were some indications that the president had spoken heatedly and impatiently when the first appellant made a warranted suggestion in his submission. Taking the actions of the president as a whole, he should have displayed a more judicial temperament, but his outbursts could not be said to have prejudicially affected the case because his criticisms were with regard to the manner in which the first appellant had conducted his case and not with regard to the merits of the case. An examination of the record showed that the appellants had not been deprived of a fair hearing (see para 36).

(3) The president had dismissed the recusal application on 3 February 2016 and given his reasons for the award on 20 June 2016. Although the preferable course was for the president to have delivered his reasons on the same occasion when the ruling was made, there was no absolute rule prohibiting a delay in the delivery of reasons. It very much depended on the nature and character of the decision made. The law and judicial practice did not impose upon the court and/or a tribunal the requirement to give comprehensive and detailed reasons immediately when a decision was pronounced. In the circumstances of the case, the president's failure to give his reasons immediately did not constitute an error or breach of the rules of natural justice (see paras 31–32).

(4) With regard to the appellants' complaint that the High Court wrongly held that it had the discretion to refuse the relief sought even if procedural impropriety had been occasioned, the simple answer was that prerogative

relief in the form of certiorari was discretionary and was not available *ex debito justitiae* to an applicant who was able to demonstrate an error of law on the part of a public decision-maker (which was not the case here). In the circumstances of the instant appeal, the ultimate decision being correct, no injustice of any sort, whether substantial or inconsequential was occasioned (see paras 42–44).

[Bahasa Malaysia summary

Perayu pertama ('Lobo') memiliki satu petak dalam bangunan berstrata dan adalah pengerusi jawatankuasa pengurusan bersama ('JPB') untuk bangunan itu. Apabila semua ahli-ahli lain yang dipilih JPB meletak jawatan, meninggalkan Lobo seorang sahaja dalam JPB itu, satu mesyuarat agung luar biasa ('EGM') telah dipanggil yang memilih responden-responden ketiga hingga kesembilan ke dalam JPB itu. Lobo menegaskan bahawa JPB itu dan pemilihan ahli-ahli baharu JPB adalah tidak sah kerana ia dilakukan menurut undang-undang yang telah dimansuhkan, iaitu, Akta Bangunan dan Harta Bersama (Penyelenggaraan dan Pengurusan) 2007 ('Akta 2007') yang telah digantikan oleh Akta Pengurusan Strata 2013 ('Akta 2013'). Ahli-ahli JPB yang baru dipilih telah memohon untuk dan memperoleh daripada Mahkamah Tinggi satu deklarasi bahawa pemilihan mereka adalah sah dan menurut undang-undang. Lobo walau apa pun telah memfailkan tuntutan ke atas perkara itu dengan responden pertama ('tribunal') dan juga memohon, dengan menggunakan Borang 14 Akta 2013, untuk memohon tribunal membatalkan notis-notis yang telah dikeluarkan oleh JPB baharu untuk mengadakan mesyuarat am tahunan ('MAT'). Berhujah bahawa responden kedua ('presiden') membuat kenyataan buruk mengenainya semasa perbicaraan tribunal, Lobo memohon agar presiden menarik diri daripada perbicaraan masa depan tribunal. Presiden menolak permohonan penarikan diri dan seterusnya menolak permohonan Borang 14 (atas alasan tribunal tidak mempunyai bidang kuasa untuk memutuskannya) dan juga tuntutan Lobo atas alasan tribunal terikat dengan keputusan Mahkamah Tinggi mengiktiraf kesahihan JPB yang baru dipilih. Perayu memfailkan permohonan semakan kehakiman di Mahkamah Tinggi untuk, antara lain, membatalkan award tribunal dan mengisytiharkan MAT perayu kedua yang diadakan pada 23 Januari 2016 terbatal dan tidak sah. Lobo menegaskan bahawa tribunal telah melanggar rukun keadilan asasi dan peraturan tata cara prosedur apabila, antara lain, presiden gagal memberitahunya tentang undang-undang di mana ia menolak permohonan penarikan diri itu. Mahkamah Tinggi menolak permohonan semakan kehakiman dan memutuskan bahawa: (a) tribunal dengan betul telah mendapati bahawa ia terikat dengan keputusan Mahkamah Tinggi tentang kesahihan dan kesahan MAT dan JPB yang baru dipilih; (b) nota prosiding dan keterangan menunjukkan bahawa Lobo diberi peluang sepenuhnya untuk menghujahkan kesnya dan membuat penghujahannya sebelum award dibuat; (c) tribunal dengan betul memutuskan bahawa ia tidak mempunyai kuasa di bawah Akta 2013 untuk membatalkan notis MAT;

A (d) tiada yang salah dengan presiden memberi persetujuan dengan pihak ketiga sebelum dia membuat keputusan mengenai permohonan penarikan diri itu; dalam apa jua keadaan, cabaran tentang alasan ini tidak dikemukakan sewajarnya di hadapan mahkamah kerana ia tidak ditetapkan dalam kenyataan perayu untuk menyokong permohonan semakan kehakiman mereka; (e) tiada
B bukti untuk menunjukkan bahawa presiden telah bertindak mala fide atau dengan motif yang tidak wajar dalam prosiding tribunal. Rayuan ini adalah terhadap keputusan Mahkamah Tinggi.

Diputuskan, menolak rayuan dan mengesahkan keputusan Mahkamah
C Tinggi:

(1) Award tribunal tidak mengalami apa-apa yang tidak sah atau tidak rasional yang mewajarkan campur tangan Mahkamah Tinggi (lihat perenggan 46).

D (2) Nota prosiding itu, deklarasi statutori perayu pertama dan award tribunal menunjukkan bahawa ulasan yang dibuat oleh presiden perlu dipertimbangkan dalam konteks yang betul — untuk mengawal ketat prosiding tribunal. Ada beberapa tanda bahawa presiden telah berbicara dengan hangat dan tidak sabar ketika perayu pertama membuat
E cadangan yang wajar dalam hujahnya. Berdasarkan tindakan presiden secara keseluruhannya, beliau sepatutnya menunjukkan perilaku yang lebih menghakimi, tetapi kecamannya tidak boleh dikatakan telah menjejaskan kes itu kerana kritikannya adalah berkenaan cara perayu pertama melaksanakan kesnya dan bukan berkenaan dengan merit kes
F itu. Pemeriksaan rekod menunjukkan bahawa perayu tidak dinafikan perbicaraan yang adil (lihat perenggan 36).

(3) Presiden telah menolak permohonan penarikan diri pada 3 Februari 2016 dan memberikan alasannya untuk award itu pada 20 Jun 2016. Walaupun cara yang lebih baik adalah untuk presiden menyampaikan
G alasannya pada masa yang sama ketika keputusan itu dibuat, tidak ada peraturan mutlak yang melarang kelewatan penyampaian alasan-alasan tersebut. Ia sangat bergantung pada sifat dan ciri keputusan yang dibuat. Undang-undang dan amalan kehakiman tidak mengenakan ke atas
H mahkamah dan/atau tribunal keperluan untuk memberi alasan yang komprehensif dan terperinci dengan segera apabila keputusan disampaikan. Dalam keadaan kes itu, kegagalan presiden untuk memberikan alasannya segera tidak menjadi kesalahan atau pelanggaran aturan keadilan asasi (lihat perenggan 31–32).

I (4) Berkenaan aduan perayu bahawa Mahkamah Tinggi terkhilaf dalam memutuskan bahawa ia mempunyai budi bicara untuk menolak relif yang dipohon walaupun berlaku ketidakpatuhan prosedur, jawapan mudah adalah bahawa relif prerogatif dalam bentuk certiorari adalah menurut budi bicara dan tidak tersedia *ex debit justitiae* kepada pemohon

yang dapat menunjukkan kesilapan undang-undang di pihak pembuat keputusan awam (yang bukan sedemikian di sini). Dalam keadaan rayuan ini, keputusan muktamad adalah betul, tiada sebarang ketidakadilan, sama ada ia besar atau tidak penting berlaku (lihat perenggan 42–44).]

Notes

For cases on appeal in general, see 2(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 822–2054.

Cases referred to

Dato' Seri Anwar Ibrahim v PP [2010] 6 MLJ 585; [2010] 9 CLJ 625, FC (refd)
Fletcher Construction Australia Ltd v Lines MacFarlane & Marshall Pty Ltd (2001) 4 VR 28; [2001] VSCA 167, CA (refd)
Hadmor Productions Ltd and others v Hamilton and others [1982] 1 All ER 1042, HL (refd)
Ho Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor [1995] 3 MLJ 369; [1996] 4 CLJ 687; [1996] 3 AMR 3693; [1995] 2 MLRA 435, FC (refd)
JRL, Re; Ex parte CJL (1986) 161 CLR 342, HC (folld)
Meek v City of Birmingham District Council [1987] IRLR 250, CA (refd)
R v Civil Service Appeal Board, ex parte Cunningham [1991] 4 All ER 310, CA (refd)
R v S (RD) [1997] 3 SCR 484, SC (refd)
Smith (Personal Representative of Smith (Deceased)) and others v Molyneaux (British Virgin Islands) [2016] UKPC 35, PC (refd)
Stratford v Ministry of Transport [1992] 1 NZLR 486, HC (refd)
Thong Ah Fat v PP [2012] 1 SLR 676, CA (refd)
Union of Construction Allied Trades and Technicians v Brain [1981] ICR 542, CA (refd)

Legislation referred to

Building and Common Property (Maintenance and Management) Act 2007 (repealed by the Strata Management Act 2013) ss 2(2), 4, 10(2), 11(1), 15, First Schedule, para 2(2)
Rules of Court 2012 O 53 r 3(2), O 59 r 8(b)
Strata Management Act 2013 ss 8, 113, 145, Fourth Schedule, Part 1, Form 14
Strata Titles Act 1985 s 36

Appeal from: Judicial Review No WA-25–59–03 of 2016 (High Court, Kuala Lumpur)

Gopal Sri Ram (David Yii and Damien Chan with him) (Bodipalar Ponnudurai De Silva) for the appellants.

N Subramaniyan (Subramaniyan) for the respondents.

Zawawi Salleh JCA (delivering judgment of the court):

INTRODUCTION

[1] This appeal is against a judgment of the Kuala Lumpur High Court (Appellate and Special Powers Division) dated 13 April 2017, dismissing the appellants' application for a judicial review of the award of the Strata Management Tribunal ('tribunal') dated 3 February 2016.

[2] Though the controversy involved in this appeal is short, in order to appreciate as to how it arose, it is necessary to set out the background facts in detail.

BACKGROUND FACTS

[3] The first appellant is a proprietor of a parcel in a property known as 'JMB Silverpark Resort, Bukit Fraser'. The second appellant is the joint management body ('JMB') established under s 4 of the Building and Common Property (Maintenance and Management) Act 2007 ('the 2007 Act').

[4] Pursuant to an annual general meeting ('AGM') on 28 October 2014, the first appellant together with four others were elected members of the joint management committee ('JMC'). Under sub-s 11(1) of the 2007 Act, the members of the JMC hold office for a period not exceeding three years or until dissolution of the JMB in accordance with s 15, whichever is earlier.

[5] In November 2014, three of the five members of the JMC resigned. The remaining two members invoked para 2(2) of the First Schedule to the 2007 Act to appoint three new members, to bring the total number of members to five.

[6] By 26 May 2015, all the other members of the JMC had resigned, leaving the first appellant alone in the committee.

[7] On 27 May 2015, a notice was sent to all proprietors to convene an extraordinary general meeting ('EGM') on 13 June 2015, pursuant to sub-s 10(2) of the 2007 Act for the election of new members of the JMC.

[8] The EGM proceeded as scheduled. At the EGM, the third to ninth respondents were appointed as the new committee members of the JMC.

[9] The first appellant maintained that he remained the chairman of the

JMC despite the vacancies. He further challenged the validity of the appointment of the new members contending that the EGM was invalid as it was conducted under the 2007 Act which was repealed and replaced by the Strata Management Act 2013 ('the 2013 Act') with effect from 1 June 2015.

[10] In June 2015, a firm of solicitors purporting to act on behalf of JMB, demanded the tenth respondent (who was the building manager for the Silverpark Resort) that he delivers up the assets, books and records of the JMB.

[11] The first appellant wrote to the tenth respondent on 29 June 2015 stating that his employment contract with the JMB had ceased to have effect from 1 June 2015 'because of the relevant provisions of the 2013 Act'.

[12] On 9 June 2015, the new JMC comprising the third to ninth respondents, commenced Originating Summons No 24NCVC-1047–07 of 2015 ('OS 1047') seeking, inter alia, declarations that:

(a) the resolutions and actions taken by the JMC to appoint new members pursuant to sub-s 2(2) of the 2007 Act, during the time that its composition was below the statutory minimum, were invalid and unlawful; and

(b) the JMC elected pursuant to the 13 June 2015 EGM was lawfully and validly elected.

PROCEEDINGS BEFORE THE TRIBUNAL

[13] The first appellant claimed that he was unaware of the aforesaid summons. On 14 July 2015, the first appellant filed a claim under the 2013 Act with the tribunal. The first hearing before the tribunal was scheduled on 11 January 2016. On the same day, the third to tenth respondents sent out a notice of the eighth AGM which was to be held on 23 January 2016.

[14] At the first hearing before the tribunal, the first appellant raised objection regarding the AGM notice. The hearing was adjourned to 14 January 2016. The first appellant then made an interlocutory application via Form 14 of the 2013 Act to cancel the notice of the eighth AGM ('the Form 14 application'). The hearing of the Form 14 application was also scheduled on 14 January 2016.

[15] The hearing resumed on 14 January 2016. The first appellant alleged that the second respondent ('the president') had made adverse remarks about him and the first appellant applied to recuse the presiding president and the claim be heard before another president.

[16] The first appellant affirmed a statutory declaration on 2 February 2016 ('the SD') which recounted his version of events at the second hearing date on 14 January 2016. The SD was submitted to the tribunal and the hearing resumed on 3 February 2016. The president dismissed the recusal application and proceeded to make the following award:

(a) dismissed the Form 14 application on the ground that the matter was outside its jurisdiction and it did not fall within any of the fourteen matters provided for in the Fourth Schedule to the 2013 Act; and

(b) dismissed the first appellant's claim on the ground that the tribunal is bound by the decision of the High Court in the OS action. Therefore, the JMC's members elected pursuant to the 13 June 2015 EGM were lawfully and validly elected. Consequentially, Mr Cheng (the tenth respondent) could only take instruction from the new JMC and was not answerable to the first appellant or the old JMC.

PROCEEDINGS BEFORE THE HIGH COURT

[17] Feeling dissatisfied and aggrieved with the decision, the appellants filed an application for leave for judicial review with the High Court to challenge and quash the decision of the tribunal.

[18] The reliefs sought are as follows:

(a) that the award of the tribunal dated 3 February 2016 be quashed;

(b) a declaration that the purported annual general meeting of the second appellant held on 23 January 2016 is null and void as being contrary to the 2013 Act;

(c) a declaration that the first appellant is not prejudiced in any way in the non-payment of maintenance and other monetary charges and interest thereon to the JMB and the first appellant's voting rights at general meetings since January 2016;

(d) that the president be prohibited from hearing the claim of the appellants dated 14 July 2015;

(e) the registrar of the tribunal be directed to fix the said claim to be heard before another President of the Strata Management Tribunal;

(f) any further other relief that the court deems fit; and

(g) costs to be paid to the appellants by the second and/or the third to tenth respondents taking into account O 59 r 8(b) of the Rules of Court 2012.

[19] The grounds upon which the reliefs are sought are as follows (see pp 76–77, record of appeal, Vol 1, Part A):

(a) that the tribunal had been in breach of the rules of natural justice:

(i) in not informing the first appellant about the law relied upon by the president to refuse to recuse himself to enable the first appellant to reply in submission;

(ii) in making the said award before even allowing the first appellant to begin his oral submissions;

(iii) in making the award without hearing the merits of the Strata Management Tribunal Claim No TPS/B-0009–7/15 and the interlocutory application in Form 14;

(iv) the tribunal and/or the president had acted in breach of the rules of procedural propriety as provided under s 113 of the 2013 Act;

(v) the first appellant had been denied his proprietary rights with regard to the allocation of shares units to his detriment pursuant to s 8 of the 2013 Act and s 36 of the Strata Titles Act 1985;

(vi) the president had acted in bad faith contrary to s 145 of the 2013 Act; and

(vii) the president had acted contrary to natural justice and/or procedural propriety and enable a *fiat accompli* for the third to tenth respondents.

[20] The application for leave was granted on 20 April 2016. After considering the submissions of the appellants and the respondents, the learned High Court judge had dismissed the appellants' application for judicial review. The reasoning of the High Court in dismissing the application may be summarised as follows:

(a) the tribunal had heard and made a determination on the substantive claims. The JMC elected pursuant to the EGM was lawfully and validly elected. The tribunal was entirely correct to have given due deference to the decision of the High Court on the issue of lawfulness of the EGM;

(b) s 113 of the 2013 Act provides for the statutory obligation of the tribunal to act fairly and impartially and to give each party a reasonable opportunity to present its case and to respond to his opponent's case. Based on notes of evidence and proceedings and the first appellant's own affidavit, he had not only been given the opportunity to file written submissions in reply to the respondents' arguments but he was also not prevented from presenting his arguments orally. Even if there was evidence to suggest that the notes of proceedings did not record each and every detail of the exchanges that had taken place at the hearing, this did not mean that what had been recorded did not actually take place;

(c) Part 1 of the Fourth Schedule to the 2013 Act provides for the matters in

which a claim may be made to the tribunal. These matters do not include the ability of the tribunal to nullify a notice of a general meeting. The tribunal is a creature of statute and does not have any inherent jurisdiction and hence must derive its powers from the four corners of its constituting Act. Having regard to the provisions of the 2013 Act as a whole, the power to grant an interlocutory order to nullify a notice of AGM is not considered as one that exists by necessary implication. The tribunal was: (a) entitled to have made a determination on the application in Form 14 after having received the written submissions of the first appellant; and (b) entirely correct to have dismissed the application on the basis that it did not have the jurisdiction to grant the order prayed for;

(d) the first appellant contended that the tribunal committed an error of law when the president stated that he had wanted to confer with others in connection with the recusal application. There was no evidence that the president had wrongly exercised his judicial discretion by conferring with third parties. There ought to be nothing wrong with a statement from an adjudicator that he or she wished to check up on the law as no one could claim to have a monopoly on knowledge. Furthermore, this ground for challenge had not been set out in the statement filed by the appellants pursuant to O 53 r 3(2) of the Rules of Court 2012, which meant that it did not form a valid ground for challenge before the court; and

(e) there was no suggestion that the president had any personal interest in the outcome of the dispute. The contention that the president was guilty of bad faith remained unproven. The first appellant's exchanges suggested some level of frustration on the part of the president in the course of conducting the proceedings which manifested in an inappropriate manner of addressing the first applicant but there was nothing to suggest that the president was motivated by bad faith or an improper motive.

[21] Being dissatisfied with the decision, the appellants appealed to this court. Hence, this appeal before us.

THE APPEAL

[22] During the course of arguments before us, learned counsel for the appellants urged for the reversal of the High Court's decision mainly on two grounds:

(a) the learned High Court judge had erred in holding that there was no breach of the rules of natural justice during the proceedings before the tribunal; and

(b) the learned High Court judge had erred in holding that in the event that there may have been procedural impropriety in the decision-making process, the reviewing court could exercise its judicial discretion to refuse the remedy.

OUR FINDINGS

Rules of natural justice

[23] We have considered the competing submissions made by learned counsel on behalf of the respective parties and perused the record of appeal. We have unanimously dismissed the appeal with costs. We now set out our reasons for so doing.

[24] Learned counsel for the appellants submitted that the president, as a decision-maker, had breached the rules of natural justice when he failed to give reasons in dismissing the recusal application. According to learned counsel, the first appellant had been deprived of his right to submit when the president failed to furnish legal authorities relied upon as the basis of the decision not to recuse himself. The first appellant's affidavit, in support of the judicial review application, captured the exchange between the first appellant and the president in the following manner (see p 109, record of appeal, Vol 2A, Part B):

> 62. Subsequently, the 2nd Respondent stated that he had made his '... rujukan ...' on the law of recusal and he did not find a reason to recuse himself and shall proceed with hearing the said Claim.
>
> 63. I had then asked the 2nd Respondent which law he had referred to since I had a right to submit on it.
>
> 64. However, the 2nd Respondent stated that if needed, it will be in the grounds of his decision.

[25] In support of his submission, learned counsel for the appellants relied on the decision of House of Lords in *Hadmor Productions Ltd and others v Hamilton and others* [1982] 1 All ER 1042, where Lord Diplock stated as follows:

> Under our adversary system of procedure, for a judge to disregard the rule by which counsel are bound has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice: the right of each to be informed of any point adverse to him that is going to be relied upon by the judge and to be given the opportunity of stating what his answer to it is.

[26] Learned counsel further submitted that the first appellant was entitled to know the reasons relied upon by the president immediately ie at the time the decision to refuse the recusal application was pronounced.

[27] We recognise that as a general rule, a court and/or tribunal which delivers a final judgment is obligated to give reasons for its decision. This is an important part of the judicial function, both in terms of explaining to the parties and an appellate court the basis for its decision. As the Judicial Committee of the Privy Council opined in *Smith (Personal Representative of Smith (Deceased)) and others v Molyneaux (British Virgin Islands)* [2016] UKPC 35 (Dame Mary Arden):

> 36. ... It is an important duty of a judge to give at least one adequate reason for his material conclusions, that is, a reason which is sufficient to explain to the reader, and the appeal court, why one party has lost and the other has succeeded: see, generally, the decision of the Court of Appeal of *England and Wales in English v Emery Reimbold & Strick Ltd* [2002] EWCA 605; [2002] 1 WLR 2409, especially at paras 15 to 21. The judge does not have to set out every reason that weighed with him, especially if the reason for his conclusion was his evaluation of the oral evidence:
>
> > ... if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, it may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon. (*English v Emery Reimbold & Strick*, para 19 per Lord Phillips MR, giving the judgment of the court.)
>
> 37. If an appellate court cannot deduce the judge's reasons for his conclusion in a case, it will set aside the conclusion and either direct a retrial or make findings of fact itself: see *English v Emery Reimbold* at para 26.

(See also *Dato' Seri Anwar Ibrahim v Public Prosecutor* [2010] 6 MLJ 585; [2010] 9 CLJ 625; *Thong Ah Fat v Public Prosecutor* [2012] 1 SLR 676).

[28] These general principles which call for the court to provide reasons for its decision are not unique to criminal and civil cases but are principles which apply to all including the decisions of the Tribunal.

[29] In relation to the formulation of a tribunal's written reasons, we refer to the following cases:

(a) in *Meek v City of Birmingham District Council* [1987] IRLR 250, it was held that a tribunal decision was not to be '... an elaborate formalistic product of refined legal draftmanship' but rather '... the parties are

entitled to be told why they have won or lost. There should be sufficient account of the facts and of the reasoning to enable to EAT or, on further appeal, this court to see whether any question of law arises ...'; and

(b) in *Union of Construction Allied Trades and Technicians v Brain* [1981] ICR 542, Donaldson LJ stated that '... Industrial Tribunal's reasons are not intended to include a comprehensive an detailed analysis of the case either in terms of fact or law... their purpose remains what it has always been, which is to tell the parties in broad terms why they lose or, as the case may be, win. I think it would be a thousand pities if these reasons began to be subjected to a detailed analysis and appeals were to be brought upon any such analysis. This, to my mind, is to misuse the purpose for which reason are given'.

[30] In *R v Civil Service Appeal Board, ex parte Cunningham* [1991] 4 All ER 310, the fact are these: The appellant a prison officer, was dismissed from the prison service after he allegedly assaulted a prisoner. He appealed against his dismissal to the Civil Service Appeal Board, which held that his dismissal was unfair and recommended that he be reinstated. The Home Office, as it was entitled to do, refused to reinstate him and the board then assessed the compensation for unfair dismissal. The board refused to give reasons for its award on the ground that it employed simple and informal procedures and that to ensure a non-legalistic approach to the merits of each individual case it had adopted a policy of not giving reasons for any award. The applicant applied for judicial review of the board's decision on the grounds that the award was prima facie irrational and the board's refusal to give reasons was a breach of natural justice. The judge granted the application because of the Board's failure to give reasons. The board appealed. The applicant cross-appealed from the judge's finding that the award was not prima facie irrational. In dismissing the appeal, the court held, inter alia, that:

> There are three possible reasons for holding that the board should have given reasons for their award. The first is that there is a general rule of the common law or, if that be different, a principle of natural justice that a public law authority should always or even usually give reasons for its decisions ... The second is that a tribunal exercising a jurisdiction which mirrors that of the industrial tribunals which are required to give reasons and further or alternatively a tribunal which is exercising a judicial function from which there is no appeal should give sufficient reasons to enable a party to know why he has failed to secure any or, as the se may be, all of the relief which he sought and above all to be satisfied that the decision was lawful. ... The third is that Mr Cunningham and others who resort to the board have a legitimate expectation that is will give reasons. This as I have shown, the Judge accepted.

[31] Having said that, we are of the considered opinion that the law and judicial practice do not impose upon the court and/or tribunal the requirement

to give his or her comprehensive and detailed reasons immediately at the time the decision was pronounced. In speaking of the practice of delivering reasons at an appreciable time after pronouncement of judgment, Eichelbaum CJ said in *Stratford v Ministry of Transport* [1992] 1 NZLR 486 at pp 488–489:

> Turning to the subject of delivery of judgment, although in common speech both are frequently referred to as the judgment or decision it is of course trite that there are two distinct aspects, the decision itself and the reasons for it. In the majority of cases, both are delivered (whether orally or in writing) on the same occasion. However, it is well established, as a matter of practice, that a Judge may announce the decision and defer the giving of reasons. Generally, it is a process Judges endeavour to avoid; the preferable course is that the decision is accompanied by the reasons for it. However, in the exigencies of judicial life, sometimes it is impossible to avoid separating the two, for example when in injunction proceedings or the like an immediate decision is required, or in the case of rulings during a jury trial when on occasion it may be necessary to proceed without delay.

[32] In this instant appeal, the president had dismissed the recusal application on 3 February 2016 and delivered reasons for the award on 20 June 2016. Although the preferable course was for the president to deliver his reasons on the same occasion when the ruling was made but there was no absolute rule prohibiting a delay in the delivery of reasons (see *Fletcher Construction Australia Ltd v Lines MacFarlane & Marshall Pty Ltd* (2001) 4 VR 28; [2001] VSCA 167). It very much depends on the nature and character of the decision made. In the circumstances of the case, we are of the considered opinion that the failure of the president to give his reason immediately would not constitute an error or breach of rules of natural justice.

BIAS

[33] The facts concerning the allegations of bias and bad faith in connection with the events leading up to the recusal application at the hearing on 14 January 2016 are relevant. To fully understand the arguments raised on this issue, we now set out the notes of proceedings of the tribunal below (see pp 742–743, record of appeal, Vol 2E, Part C):

> Mr. Lobo : Reply
>
> All my basis, to make this claim, in para 1 and 2. As JMB and purchaser para 3
>
> Section 107 (b) allows me to make application. July 2015 belum ada keputusan High Court, decision pada 30.12.2015.
>
> Para 1 Forth Schedule ada wide power to tribunal.
>
> Minta sahkan arahan COB melalui surat 4.6.15 para 13, para 14 fall under section (1) Fourth Schedule dan Section 12.
>
> Tribunal : I was responding to your words, hinting that the tribunal making your life difficult.

Mr. Lobo : Objecting that the tribunal saying that you are making everyone life objection difficult. I was responding, to your word, 'don't you think that you are making life difficult for everybody else'.

Mr Choo : I believe the tribunal, must have latitude to express itself in the course of the proceeding. In the circumstances of the case allow me to use for want of words, it is tantamount to a threat to tribunal. The tribunal will not be able to perform its duty (for want of a word) it only expressing words, in the course of proceeding.

I don't think the tribunal can perform his duty in the face of threat in recusing decision claimant from the case.

Mr. Lobo : In High Court the application is made to recuse the judge on lesser grounds, it is legitimate. He may want to go for JR. There is no threat.

I want to proceed my application to recuse the president.

Tribunal : I will postpone the proceeding to consider the claimant's application that the president recuse himself or proceed.

[34] The first appellant's SD recorded the proceedings as follows (see pp 311–312, record of appeal, Vol 2B, Part C):

(b) With regard to my written submission dated 13/1/2016, the learned Chairman had stated on 14/1/2016 that the matter in paragraph 2.3 of the said submission was misquoted by me. No actual words of the Chairman was given.

(c) The Chairman then posed questions to Mr Choo and provided the answer and recorded the same. That was before I had commenced my submissions. I was then asked to reply.

(d) As I began my oral submissions and touched on the irregular way where Mr Choo was led to answer questions, the Chairman commented why I was '... showing face ...'.

(e) I replied that I am not showing face but submitting orally as invited to do so.

(f) The Chairman kept on interrupting me in the next minute or so and then stated '... can you appreciate that you are making everyone's life difficult ...'

(g) I thereupon applied for the Chairman to recuse himself from hearing the matter further ('the Recuse application'). At that time a female law student from the Legal Firm of Mr CC Choo was present in the public gallery of the tribunal.

(h) I am entitled to make the Recuse application in view of Section 113 of the Strata Management Act 2013 (SMA) and the principle that justice must not only be done but be seen to be done.

(i) I asked the Chairman to record my oral application.

(j) The Chairman then told Mr Choo to reply.

(k) Mr Choo in short, said that for want of a better word, my application was a '... threat ...'

(l) After that, I had replied that Mr Choo himself had 'threatened' Judicial Review proceedings against the tribunal on the first day of hearing on 11/1/2016. There was no rebuttal from anybody to that statement by me.

(m) The Chairman then adjourned proceedings to '... discuss with others ...' my Recuse application. When I asked if that is regular, he said he wanted to '... check up on the law ...'.

(n) I then gave notice to all in particular the Respondents that my interlocutory application dated 13/1/2016 and filed in the tribunal was pending. I gave the notice since the subject of my interlocutory application was because the Respondents were planning the 8th Annual General Meeting (AGM) on 23/1/2016. If the said AGM was held, it will make my said interlocutory application academic.

(o) The Chairman and the Respondents had no comments. The chairman then adjourned proceedings to a date to be fixed to decide on the Recuse application.

[35] The president had addressed the issue on the recusal application in his award (see pp 757–759, record of appeal, Vol 2E, Part C):

11. In due course of the trial, there were arguments between the claimant and this tribunal and also with the respondents and as a result, the claimant then applied for the presiding President to recuse himself and the case be heard before another President. The arguments mostly caused by the claimants who to certain extend inappropriately intervened in the course of the trial. Thus, the recusal application was not allowed as the tribunal is fully aware of the fact that it does not have any interest in the case whatsoever and parties are no acquaintance to the President. There is no action that shows tendency to favour any party in this case. This case was decided based solely on facts and law. The arguments between the claimants that the tribunal, were purely in due course of trial and mere change of words in differing opinions and misunderstanding.

12. The claimant, goes to the extent of making a misquoted statement in his submission, by quoting something which the tribunal did not say. This was one of the issues, if at all becomes one of the central issues that leads to argument between the parties and tribunal. The facts to the issue is that one of the notices of a resolution to be discussed and voted in the AGM 13.6.2015 is short serviced to the parcel owner, and when the tribunal says this, 'it can be rectified in the meeting itself', what the tribunal meant is that the attending members (qualified parcel owners to attend the AGM) during the meeting itself can opt to propose and further call for that particular resolution (which is short serviced) NOT to be discussed and passed in the AGM. But it (short serviced itself) is not a valid reason to stop the AGM.

13. However, the whole episode of arguments, is not in any way prejudicial to any party. Being dissatisfied with the presiding President words or arguments is not a valid reason for recusal.

[36] We have carefully perused the notes of proceedings, the first appellant's SD and the award. In our considered opinion, the comments made by the president must be looked at in the proper context — to keep a tight rein on proceedings of the tribunal. To be fair to the first appellant, there were some indications that the president spoke heatedly and impatiently when the first appellant made a warranted suggestion in his submission. Taking these actions

of the president as a whole, it must be said that he should have displayed a more judicial temperament, but we cannot say that his outbursts prejudicially affected the case because his criticism was with regards to manner in which the first appellant conducted his case and not the merits of the case itself. We are not condoning any impatience of a discourteous kind, but an examination of the entire record convinces us that it did not deprive the appellant of a fair hearing.

[37] The case of *Hadmor Productions* cited by the first appellant does not assist the appellants. In that case, during arguments before the Court of Appeal, counsel had refrained from referring to speeches in Hansard for the purpose of interpreting the particular Act of Parliament. At no time during the course of hearing the appeal did Lord Denning MR who presided, indicate that he proposed to refer to *Hansard*. At the time that case was decided it was accepted that you could not have recourse to *Hansard* to interpret a statute. However, when he came to write his judgment the Master of the Rolls relied on *Hansard*. Lord Diplock commented adversely on this and it was under this circumstance that the decision of the Court of Appeal was set aside. By contrast, the present case is not one that concerns a decision made by the tribunal based on a point which was not pleaded.

[38] Before we conclude on this issue, we would like to emphasise that a judge and/or president of tribunal who has been duly appointed to hold a judicial office must discharge the duties of the office without fear and favour and must not yield unquestioningly to suggestion of bias. As Mason J, sitting in the High Court of Australia in the case of *Re JRL; Ex parte CJL* (1986) 161 CLR 342 (HCA) at p 352 entered a note of caution. He warned that:

> Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.

We also agree with a further observation made by Mason J in the same case that:

> It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party.

[39] In *R v S (RD)* [1997] 3 SCR 484, L'Heureux-Dubé J and McLachlin J said:

> Although judicial proceedings will generally be bound by the requirements of natural justice to a greater degree than will hearings before administrative tribunals, judicial decision-makers, by virtue of their positions, have nonetheless been granted considerable deference by appellate courts inquiring into the apprehension of bias.

A This is because judges 'are assumed to be [people] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances': *United States v Morgan* 313 US 409 (1941), at p 421. The presumption of impartiality carries considerable weight, for as Blackstone opined at p 361 in *Commentaries on the Laws of England III* ... '[t]he law will not suppose a B possibility of bias or favour in a Judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea'. Thus, reviewing courts have been hesitant to make a finding of bias or to perceive a reasonable apprehension of bias on the part of a Judge, in the absence of convincing evidence to that effect: *R v Smith & Whiteway Fisheries Ltd* (1994) 133 NSR (2d) 50 (CA), at pp 60–61. C

[40] In our opinion all the above observations squarely applies to the president of the tribunal.

D **[41]** For these reasons, the appellant's first ground of challenge must fail.

Ex debito justitiae

E **[42]** Learned counsel for the appellants complained that the learned High Court judge had erred in holding that if procedural impropriety had been occasioned, the court still has the discretion to refuse the relief sought.

[43] The simple answer to the second submission is this. Prerogative relief in F the form of certiorari is discretionary and is not available *ex debito justitiae* to an applicant who is able to demonstrate an error of law on the part of a public decision-maker — which we hasten to repeat that this is not the case here (see *Ho Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369; [1996] 4 CLJ 687; [1996] 3 AMR 3693; [1995] 2 MLRA 435).

G **[44]** Suffice to say that in the circumstances of this instant appeal, the ultimate decision being correct, no injustice of any sort, whether substantial or inconsequential, has been occasioned because of the alleged wrong reasons.

H **[45]** Therefore, the second point raised by the appellants is also rejected.

CONCLUSION

I **[46]** For the reasons stated above, the appeal is devoid of merit. The impugned award dated 3 February 2016, suffers no illegality or irrationality warranting interference by the High Court. Accordingly, we had dismissed the appeal with cost of RM10,000 and affirmed the decision of the High Court. Deposit was refunded.

Appeal dismissed and the High Court's decision affirmed.

Reported by Ashok Kumar